THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 115 OF 2021

(Originating from the District Court of Ileje at Itumba Criminal Case No. 31 of 2021- Magezi, SRM)

NURU JONAS MWAMPASHI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 13/06/2022

Date of judgment: 18/07/2022

NGUNYALE, J.

The background giving rise to this first appeal may be narrated briefly as follows; that the victim PW1 a girl aged 16 years old was a form three student at Mbebe Secondary School. The appellant NURU JONAS MWAMPASHI (27) was a resident of Mbebe village within Ileje District and Songwe Region. It was alleged that the victim and the appellant engaged in illegal sexual intercourse termed 'rape' on 1st January 2020. Following the alleged act of rape which was among their new year events the victim

became pregnant. Sometimes around May 2020 the appellant was alleged to have abducted the victim and started to live with her at Mbozi District as husband and wife till 2nd August 2020 when the appellant gave her bus fare to return back ghome (Ileje District).

Upon her return home she revealed the story to her parents that she was living with the appellant at Mbozi. On 6th September 2020 the victim delivered a baby girl at Tunduma Healthy Centre and she named the appellant as the father of the baby born.

The incident was reported to police and the wheels of justice enabled the arrest of the appellant on 27th September 2020 and arraigned before District Court of Ileje at Itumba to answer offences in two counts as follows; -

In the first count the appellant was charged with the offence of Rape c/s 130 (1), (2) (e) and 131 (1) of the Penal Code Cap 16 R. E 2019. It was alleged that the appellant on 1st day of January 2020 at 12:00 hours at Mbebe village Ileje District in Songwe Region did carnal knowledge to the victim a girl aged 16 years old a student of Mbebe Secondary School. And in the second count he was charged with the offence of impregnate a school girl c/s 60A (1), (3) of Education Act Cap 353 as amended by section 22 of Written Laws Miscellaneous Amendment Act No. 2 of 2016.

It was alleged that the appellant on 1st day of January, 2020 about 12:00 hours at Mbebe village within Ileje District in Songwe Region did impregnate the victim a school girl of Mbebe Secondary School.

Upon a full trial the appellant on 5th November 2021 was found guilty over the first count which he was sentenced to serve thirty (30) years imprisonment and acquitted over the second count of Impregnating a School Child.

Protesting for his innocent the appellant is before the Court challenging his conviction and sentence per his petition dated 23rd November 2021 premised on four grounds of appeal; -

1. *That the trial Magistrate erred in law and facts by convicting the appellant while the prosecution failed to prove the case beyond all reasonable doubt.*
2. *That the trial Magistrate erred in law and facts for failure to consider the appellants defence evidence in deciding the case.*
3. *That the trial Magistrate erred in law and fact for failure to properly evaluate prosecution evidence.*
4. *That the trial Magistrate erred in law and facts for deciding the case by relying only on evidence of the victim who is not a credible witness.*

He prayed the Court to be pleased to quash the proceedings and judgment of the trial Court and set the appellant at liberty.

On the date of hearing the appellant appeared represented by Mr. G. Msegeya learned Advocate and the respondent was ably represented by Hannarose Kasambala learned State Attorney.

Mr. Msegeya in support of the appeal submitted that the 1st and 3rd grounds of appeal together that the trial Court erred to convict the appellant on the offence of rape where there was no strong evidence to ground conviction. He submitted that the prosecution relied on circumstantial evidence, as a rule of practice circumstantial evidence must be water tight. PW1 sensed to be pregnant on the date he alleged she had sexual intercourse with the appellant on 1st January 2020 but she could not report the incident to her parents on the same date. It gis doubtful that she sensed pregnancy on the same day. PW2 testified that on 27th day of May 2020 the event was reported to the Ward Executive Officer and later to Ileje police station but neither the WEO nor the police were called to testify about receiving the report of rape. It was not proved if the appellant is the person who raped the victim or another person.

It was his further submission Mr. Msegeya that there is no direct evidence which link the appellant with the alleged rape, also there is no medical report to such effect. There was to be DNA or forensic evidence to prove that he raped. It is a rule that evidential gap must be filled as ruled in the

case of **Christopher Candidus @ Albino vs. Republic** (2017) TLR. He therefore prayed the 1st and the 2nd ground to be allowed.

On the fourth ground Mr. Msegeya erred to rely on the testimony of the victim who was not credible. Her act of not reporting the incidence to her parents connotates that she was an experienced girl on sexual matters. Thirdly, the act of naming three different fathers has no sufficient explanation. He submitted that he is mindful that in rape cases the true evidence comes from the victim but there is exception when the victim is not credible. He referred the case of **Mohamed Said vs. The Republic**, Criminal Appeal No. 145 of 2017 Court of Appeal Sitting at Iringa that it was never intended the words of the witness to be taken as a gospel truth but ought to be subjected to analysis to be proved to be nothing but the truth.

On the second ground of appeal that the trial Magistrate erred in law and fact by failure to consider defence case Mr. Msegeya submitted that the trial Court after closure of the defence case proceeded to convict basing on the prosecution case. The trial Magistrate did not assign any reason to avoid the defence evidence. He referred to the case of **Hamis Rajab Dibagula vs Republic** (2004) TLR 196 where it was insisted that judgment must indicate that the Magistrate directed its mind to the

evidence on record. At the end Mr. Msegeya prayed the Court to allow the appeal by quashing proceedings and judgment and set aside conviction and sentence.

Ms. Kasambara from the outset declared his stance that they do not support the appeal and the 1st and 4th grounds of appeal will be considered together likewise the 2nd and 3rd grounds of appeal. On the 1st and 4th grounds of appeal she submitted that the grounds have no merit because the prosecution proved that it was the appellant and nobody else who raped the victim. PW1 clearly explained how she met the appellant and how she had sexual intercourse with him. The appellant took her to Mbozi where they were living over the same roof as husband and wife. The testimony of the victim proves that the appellant and in essence the true evidence of rape comes from the victim herself as stated in the case of **Suleman Makumba vs. R** (2006) TLR 379. The trial Court was satisfied that her evidence was credible. Every witness must be given credence unless there is good reason to the contrary. In this case there is no reason to rule to the contrary.

In her further submission Ms. Kasambala submitted that the trial Court findings on credibility binds the appellate Court as it was ruled in **Goodluck Kyando v. R** (2006) TLR 367. She also referred the case of

Dickson Elia Shemweta vs. R, Criminal Appeal No. 92 of 2007 Court of Appeal of Tanzania at Mbeya where the Court insisted that once the trial Court believes the testimony of the victim and her demeanour the victim must be believed. The evidence of the victim was corroborated by PW2, pw3, pw4, PW5 and PW6. Everybody testified about what he did and how he received information about rape of the victim. The argument that she did not report on the first day of rape has no merit because it is not in dispute that they had sexual relationship and they were living together. It was irrelevant to call local leaders and police to prove because section 143 of Evidence Act Cap 6 R. E 2019 provides that there is no limit of number of witnesses to prove the fact on issue. About the clinic card the appellant directed the victim to record a different name. She submitted that the 1st and 4th grounds of appeal have no merit at all.

In rejoinder Mr. Msegeya submitted that they are of the settled view that the victim was not a credible witness by mentioning three people as the fathers of the child. He prayed the appeal to be allowed.

Having in mind the grounds of appeal and the rival submission I am convinced that the appeal will be adequately determined basing on **three issues** namely; **one**, whether the prosecution side proved the case beyond reasonable doubt, **two**, whether the victim is the credible witness

and **three**, whether the trial magistrate evaluated the evidence of both parties before reaching the impugned judgement.

Regarding the second issue which is based on the forth ground of appeal that whether the victim is the credible witness it is trite principle in rape cases that the true evidence comes from the victim and other prosecution witnesses additional corroborative evidence which might not necessarily be relied upon. This was held in the case of **Selemeni Makumba** (supra) which states;

> *'The evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in case of any other women where consent is irrelevant, that there was penetration'.*

In this case at hand PW1 testified before the trial court how and when she had sexual intercourse with the appellant for the first time when she went to fetch water at the river known as Katendo which is in Mbebe village in Ileje District. It was their first time to have sexual intercourse. The victim said that she knows the appellant since they were living in the same village. The appellant was engaged with the activities of constructing tarmac road from Mpemba area in Momba District to Ileje District. The school was closed due to COVID 19 pandemic, when the school was opened, she did not return to school. On May 2020 the appellant came and left with her. They went to Mbozi District in Vwawa

where they started living together as husband and wife. They lived together for almost three months, till August 2020 when the victim was given fare by the appellant, for her to return back to her parents.

The victim named the appellant as the one who raped her. The victim was medically checked and it was proved that she was pregnant. The assessment of credibility and demeanour of a witness is the monopoly of the trial Court. That the trial court is the one with ample time to note the demeanour of the witness.

In the case of **Goodluck Kyando** (supra) which was cited by the respondent counsel, it was held that;

> *'Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness'.*

Therefore, I concede with the respondent counsel argument that, the court has a duty to believe the testimony of the victim and his demeanour unless there is good reason to the contrary. That the testimony of a witness will remain considered to be consistent and believable unless the veracity of the witness has been assailed on his or her part to misrepresent the facts or has given fundamentally contradictory facts or improbable evidence. This was stated in the case of **Robert Sanganya**

V. The Republic, Criminal Appeal No, 363 of 2019, CAT at Dar es Salaam.

In the case of **Shabani Daudi V. The Rebublic**,Criminal Appeal No. 20 of 2001(unreported) provides a guide on how the credibility witnesses can be assessed as it was observed; -

> *'The credibility of a witness can also be determined in other two ways, that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses'.*

Therefore, I am of the firm view that, on credibility of PW1, the trial court properly assessed her evidence and found it credible and free from any contradictions. The evidence of PW1 was sufficiently corroborated by PW2, PW3, PW4, PW5 and PW6 revealing coherence and consistency. Everybody testified about what he did after receiving the information. The trial Court was right to reach the said findings as it did that PW1 had been raped by the appellant. The victim explained when she met with the appellant when they had sexual intercourse which is an essential ingredient of rape. Therefore, it is difficult to disbelieve the evidence of PW1 without raising as substantial doubt. The trail Magistrate was satisfied that PW1 was competent, credible and reliable witness. In that

respect there is no need to interfere with the findings of the trial court about credibility of PW1.

The complaint by the appellant counsel that the victim did not report the matter to her parents on the same date he was raped establish that she was not credible has no merit because the essential ingredient of rape i. e penetration has been proved. The testimony of PW1 is very certain that she had sexual intercourse with nobody but the appellant.

In the first issue as to whether the prosecution has proved the case beyond reasonable has been framed out of the 1st ground of appeal. It is trite law that the prosecution has the obligation to prove the case beyond reasonable doubt. This issue cannot detain long the Court because it has been proved that PW1 was a credible witness who proved that she was raped by nobody but the appellant. The appellant was convicted of rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code [cap 16 R.E 2019], in which the relevant provision is hereby reproduced;

> *'S.130 (2)A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man'.*

The case of **Wiston Obeid V. The Rebublic**, Criminal Appeal No. 23 of 2016 CAT Bukoba, it was held that in statutory rape,

> *'the prosecution side need to prove three ingredients, one, that the age of the victim is under eighteen years, two, that the accused had sexual intercourse with the victim by proving penetration, three, that having proved the age of the victim to be below 18 years, it becomes immaterial as to whether the victim consented or not'.*

In this case at hand the age of the victim is not in dispute. Because it was proved by the victim herself in her oral evidence that she is 16 years old and the father of the victim prove that her child is below 18 years old.

The second issue as to whether the appellant had sexual intercourse with the victim or not. This second issue has already been proved by the victim that she was raped by the appellant and nobody else. In the case of **Maliki George Ngendakumana V. The Republic,** Criminal Appeal No. 353 of 2014 CAT at Bukoba, it was held that;

> *'...it is the principal of law that in criminal cases, the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it is the accused person who committed it'.*

The evidence of PW1 which fall under the best evidence rule in rape cases proved that he was raped by the appellant. As stated above that she had sex with the appellant. The same was corroborated by the evidence of PW2 and PW4 who testify about the absence of the victim from May to

august 2020. The evidence of PW5 and PW6 prove that the victim was living with the appellant, they were living as husband and wife.

Therefore, the evidence of the victim in this case as discussed in the first issue is self-sufficient and free from any doubt. Others are giving corroborative evidence only. In the case of **Godi Kasenegal V. Republic,** Criminal Appeal No. 10 of 2008 (unreported) stated that;'

> *'It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident such as doctors may give corroborative evidence'.*

The argument by the appellant counsel that the evidence is circumstantial evidence has no basis at all. The complaint that there are different names in the clinic card. The complaint that in the birth certificate that the victim named three fathers who were responsible for her pregnant do not disturb the proof of ingredients of rape. There is evidence that the appellant directed her to give different names to hide the truth.

The complaint that there is no evidence of WEO and police officer where the event occured is also immaterial and without basis at all. The best evidence in rape cases comes from the victim. The evidence of the victim was capable of proving the case against the appellant without any corroborative evidence as per s. 127(6) of TEA. It is a general rule that evidence of a single witness is capable of proving a fact in issue and

support conviction. S.143 of TEA as cited by the respondent Attorney that what matters is weight of evidence and nGot the number of witnesses.

In the complaint that the prosecution did not lead to the conclusion that it was the appellant who raped the victim. There is evidential gap, that there was to be DNA or Forensic Evidence to prove rape. I think it has already been proved that the appellant is the one who raped the victim. It is already settled law that DNA test is not one of the legal requirements in proving rape cases. It was held in the case of **Prosper Manjoel Kisa V. Republic,** Criminal Appeal, No.73 of 2003 (unreported) CAT;

> *'...lack of medical evidence does not necessarily in every case have to mean that rape is not established where all other evidence point to the fact that it was committed'.*

Furthermore, in the third issue as to whether the trial magistrate evaluate the evidence of both parties, this issue is from the second and third ground of appeal. The appellant Counsel argued that the trial Magistrate decided the case basing on the evidence of the victim and did not consider the defence of the accused, but the respondent counsel argued that the trial Magistrate considered evidence of both parties to enter it verdict.

Having perused the trial court proceedings and judgement, it is true that the trial magistrate did not consider evidence of both parties. The trial Magistrate ended to summarise the evidence of both parties, and after

raising the legal issues he considered only the prosecution evidence in convicting the appellant. This was held in the case of **Hussein Idd & Another V. republic** (1986), TLR 283, that;

> *'Failure to consider the defence case was so serious a misdirection that, a conviction would not be safe'.*

The first appellate court has been empowered to re-evaluate the evidence of both parties as held in the case of **Prince Charles Junior** (supra) which was cited by the respondent counsel. Now where do evaluation takes us to?

In her evidence, the victim (PW1) who was a school girl at Mbebe Secondary School testified that she had sexual intercourse with the appellant, around 12:00 afternoon on 1/1/2020 when she was going to fetch water at the river known as Katendo in Ileje District. Later she sensed to be pregnant. The appellant was living in Mbebe village also and was engaged in activities of constructing tarmac road from Mpemba area to Ileje. She was taken by the appellant to Mbozi District where they started living as husband and wife. The appellant testified that he did not either rape the victim or impregnate her. Generally, he was against what was testified by the victim that he was not known to PW1, he came to know her when she came to testify in this case. He only accepted that he was among the person who were constructing tarmac road. But the

appellant did not raise these allegations when he cross examined the victim, that he did not know the victim. The victim proved that she had sexual intercourse with the appellant, this means she proved how they met, and thereafter they started living as husband and wife. The evidence of the victim is self-sufficient in the issue of penetration because the opposition by the appellant has no merit at all in this aspect.

The appellant argued that allegation that he was the one abducted the victim from her parents was false. The land lord (PW5) and his in law (PW6) prove that the appellant was living with the victim, (PW5) the land lord testified to receive the rent Tshs. 10,000 from the victim, the victim told her that she was brought there by the appellant. He stated that the appellant was the only tenant who was paying Tshs 10,000/=. (PW6) testified that the appellant was living there and he was living with the girl who was pregnant. They were living as husband and wife. (PW1) said that she stayed there for almost three months, from May to August/2020.The appellant in this aspect testified that he did not send the victim to hand to PW5 Tshs 10,000/= as rent. The appellant had no substantial evidence to shake the prosecution case which was intact about staying with and raping the victim. Therefore, re-evaluation of evidence takes us to the

same answer given by the trial Court that the appellant is the one who raped the girl.

Therefore, after the re-evaluation of evidence of both parties I sincerely appreciate that the prosecution proved the case beyond all reasonable doubt the standard required in criminal justice. The evidence of the appellant did not raise any doubt to the prosecution case.

Having said and done, the Court is of the settled opinion that the offence of rape contrary to section 130(1)(2) (e) and 131 (1) of the Penal Code [cap 16 R.E 2019] was proved beyond all reasonable doubt as held by the trial Court. The appeal as filed by the appellant has no merit at all, it is hereby dismissed entirely.

Dated at Mbeya this 18th day of July 2022.

D. P. Ngunyale
Judge
18/07/2022